

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 129.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

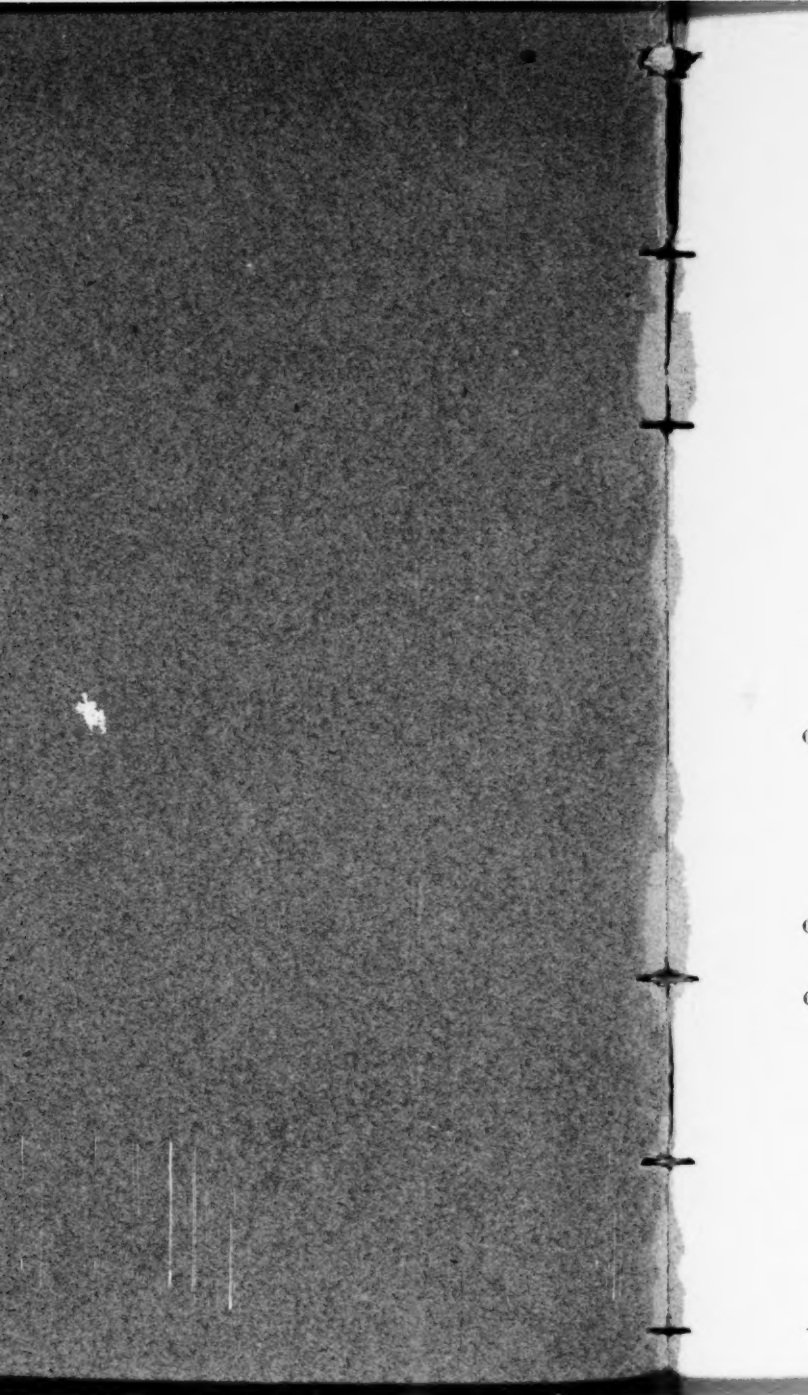
DAVID JOY, ADMINISTRATOR OF THE ESTATE OF
JOHN A. HERVEY, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

FILED JULY 2, 1898.

(16,620.)

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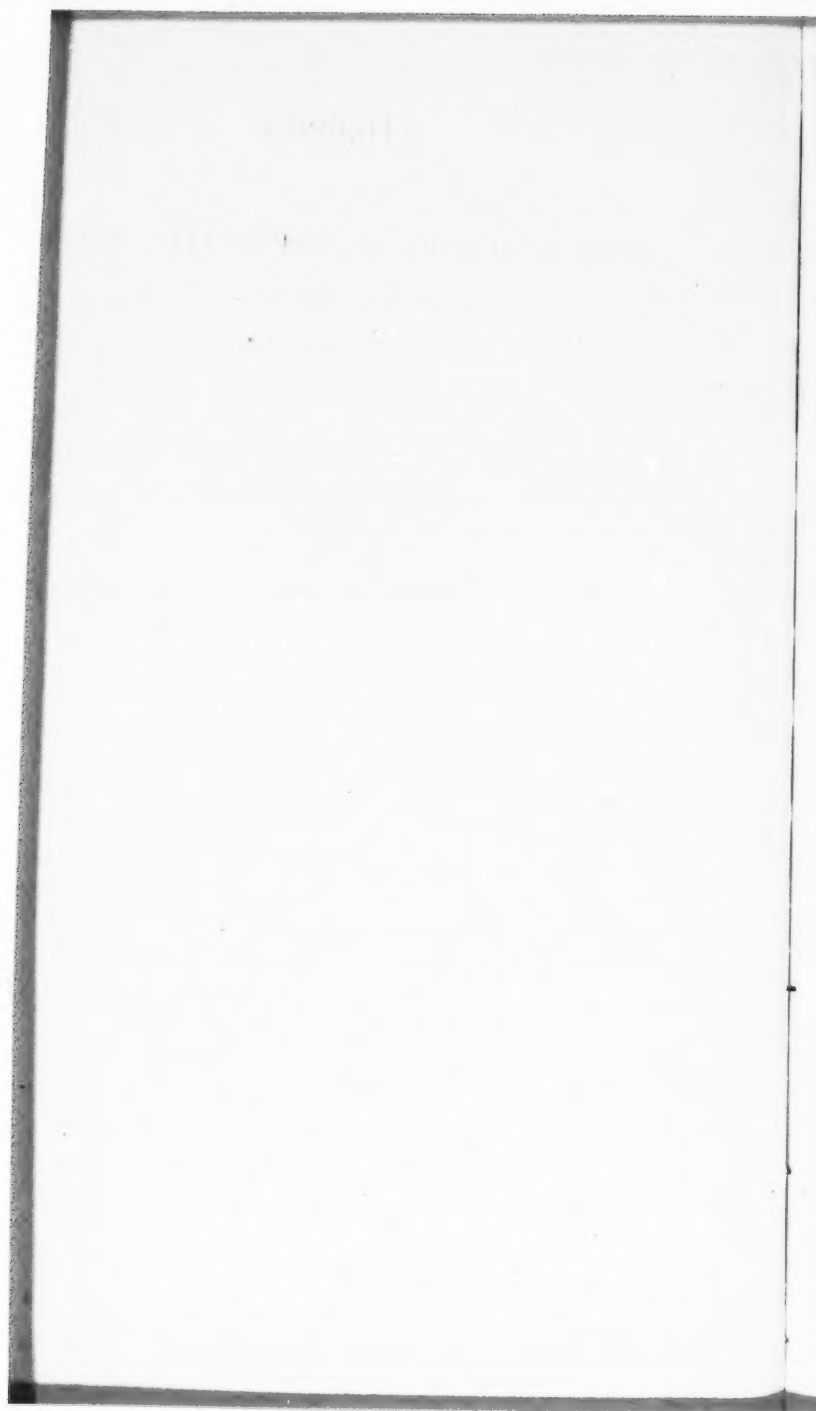
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1 United States Circuit Court of Appeals, Sixth Circuit.

BALTIMORE & OHIO RAILROAD Co., Plain- tiff in Error, vs. DAVID JOY, Administrator of the Estate of John A. Hervey, Deceased, Defendant in Error.	}	No. 311. Error to the Circuit Court for the Northern District of Ohio.
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This cause coming on to be heard before the court was presented upon brief and argument of counsel and submitted to the court. After consideration the judges of the court are in doubt upon an important question of law arising therein, the decision of which is necessary to the decision of the cause. It is accordingly ordered that the question upon a sufficient statement of facts be certified to the Supreme Court for its instruction thereon. The statement of facts is as follows:

John A. Hervey, a citizen of Ohio, was on October 18, 1891, a passenger on a train of the Baltimore & Ohio Railroad Company, running between Chicago, Illinois, and Fostoria, Ohio, upon a ticket purchased at the former place. While upon said train, as a passenger, he was injured in a collision caused by the negligence of the Baltimore & Ohio R. R. Co. at the town of Albion in the State of Indiana. On December 31, 1891, Hervey, then in life, filed his petition in the common pleas court of Hancock county, Ohio, against the Baltimore & Ohio R. R. to recover damages for the personal injuries caused in the collision above referred to. On January 23, 1892, the railroad company removed the case to the circuit court of the United States for the northern district of Ohio on the ground of diverse citizenship. Pending the action and on October 23, 1892, Hervey died and the action was afterward, against the objection of the defendant company, revived in the name of Hervey's administrator appointed by the probate court of Hancock county, Ohio, the county of his residence.

By the law of Ohio in force at the time of the death of Hervey, the common-law rule as to abatement of causes of action for personal injuries prevailed. By section 5144 of the Revised Statutes of Ohio then in force, it was provided that:

2 "Except as otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance or against a justice of the peace for misconduct in office, which shall abate by the death of either party."

It has been held by the supreme court of Ohio, that under this section a pending suit for personal injuries does not abate upon the death of the plaintiff, but that the suit may be revived in the name of his personal representative. *Ohio & Penns. Coal Co. v. Smith*, adm'r, 53 Ohio State, 313.

By the law of Indiana, sec. 283 of the Revised Statutes of Indiana, it is provided that :

"A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment and malicious prosecution."

Section 272 of the Revised Statutes of Indiana provides that :

"No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue."

Sec. 955 of the Revised Statutes of the United States provides :

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

Upon the foregoing statement this court respectfully requests the instruction of the Supreme Court upon the following question :

Does an action pending in the circuit court of the United States sitting in Ohio brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?

WM. H. TAFT,
HORACE H. LURTON,
E. S. HAMMOND,

Judges Sitting in the Circuit Court of Appeals.

May 24, A. D. 1897.

3 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, }⁸⁸ :

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Baltimore & Ohio Railroad Company v. David Joy, administrator of the estate of John A. Hervey, deceased, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate was by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have
Seal United States Circuit Court hereunto subscribed my name
of Appeals, Sixth Circuit. and affixed the seal of said court,
at the city of Cincinnati, Ohio,
this 22nd day of June, A. D. 1897.

FRANK O. LOVELAND,
*Clerk of United States Circuit Court of
Appeals for the Sixth Circuit.*

Endorsed on cover: Case No. 16,620. U. S. circuit court of ap-
peals, 6th circuit. Term No., 129. The Baltimore & Ohio Railroad
Company, plaintiff in error, vs. David Joy, administrator of the
estate of John A. Hervey, deceased. Certificate. Filed July 2d,
1897.